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No. 03-288

In the Supreme Court of the United States

BRONX LEGAL SERVICES AND
QUEENS LEGAL SERVICES CORP., PETITIONERS

v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Office of Inspector General of the Legal Services Corporation requested client names from Legal Services for New York City (LSNY), and LSNY, in turn, requested those names from petitioners. Petitioners' contracts with LSNY incorporate the requirements of a federal law that compels the disclosure of client names if requested by federal auditors. The questions presented are:

1. Whether petitioners' contracts with LSNY require petitioners to furnish the client names.

2. Whether the statute compelling disclosure of client names is constitutional.

3. Whether the appointment of the Inspector General violates the Appointments Clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Edmond v. *United States*, 520 U.S. 651 (1997)	11, 12
Freytag v. *Commissioner*, 501 U.S. 868 (1991)	12
Maher v. *Roe*, 432 U.S. 464 (1977)	10
Rust v. *Sullivan*, 500 U.S. 173 (1991)	10
United States v. *Germaine*, 99 U.S. 508 (1879)	12
United States v. *Legal Servs. For New York City*:	
100 F. Supp. 2d 42 (D.D.C. 2000)	4
249 F.3d 1077 (D.C. Cir. 2001)	3, 4, 7-8, 9
United States v. *Ortiz*, 422 U.S. 891 (1975)	11

Constitution, statutes and rule:

U.S. Const.:	
Art. I, § 2, Cl. 3 (Appointments Clause)	11, 12
Art. II, § 2, Cl. 2	8, 11, 12
Art. VI, Cl. 2 (Supremacy Clause)	8
Amend. I	5, 9
Inspector General Act of 1978, 5 U.S.C. App. 1	3
5 U.S.C. App. 2	3
5 U.S.C. App. 3	11
5 U.S.C. App. 4(a)(1)	3
5 U.S.C. App. 8G(c)	3, 10
Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 509(h), 110 Stat. 1321-58	2, 4, 5, 6-7, 8, 9, 10
42 U.S.C. 2996b(a)	2
42 U.S.C. 2996c(a)	12

Statute and rule—Continued: Page

42 U.S.C. 2996e(b)(3) 2, 7

N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(c)(2) (2000) 5, 7, 8-9

Miscellaneous:

H.R. Conf. Rep. No. 479, 106th Cong., 1st Sess. (1999) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter, but is reprinted in 64 Fed. Appx. 310. The order of the district court (Pet. App. 5a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2003. The petition for a writ of certiorari was filed on August 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Legal Services Corporation (LSC) is a non-profit corporation established under the Legal Services Corporation Act of 1974. See 42 U.S.C. 2996b(a). LSC's mission is to provide "legal assistance in non-criminal proceedings or matters to persons financially unable to afford legal assistance." *Ibid.* LSC does not provide those services directly; instead, it makes grants to legal service organizations to provide the services. The legal service organizations either provide the services directly or subcontract with other legal service organizations to provide them.

The Legal Services Corporation Act generally does not permit LSC to "interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association," or "abrogate as to attorneys * * * the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction." 42 U.S.C. 2996e(b)(3). Section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-59, however, creates an express exception to Section 2996e(b)(3). Section 509(h) provides that, notwithstanding Section 2996e(b)(3), recipients of funding from the LSC can be required to furnish to federal auditors "financial records, time records, retainer agreements, client trust fund and eligibility records, and client names." § 509(h), 110 Stat. 1321-59. Congress has incorporated Section 509(h) by reference in subsequent appropriations Acts.

2. LSC provides funding to Legal Services for New York City (LSNY). Pet. App. 6a. LSNY, in turn,

distributes funding to Bronx Legal Services and Queens Legal Services (petitioners). *Ibid.* The contracts through which LSNY provides funding to petitioners require that petitioners comply with certain "Assurances." *Id.* at 13a. One of the Assurances substantially duplicates the disclosure obligation in Section 509(h). A provision in the contracts also incorporates that obligation. *Ibid.*

3. The Inspector General Act of 1978, 5 U.S.C. App. 1, establishes Offices of Inspector General as "independent and objective units" in each of various federal agencies and entities, including LSC. 5 U.S.C. App. 2, 8G(2). The Inspector General has authority to audit and investigate LSC programs and operations. 5 U.S.C. App. 4(a)(1).

In 1998, the Inspector General discovered through a series of audits that some grantees had overstated the number of cases handled in their reports to the Corporation and had kept inadequate records. *United States* v. *Legal Servs. For New York City*, 249 F.3d 1077, 1079 (D.C. Cir. 2001). In November 1999, a congressional conference committee raised concerns about inaccuracies in grantee reports and requested the Inspector General to "assess the case service information provided by the grantees" and "report * * * no later than July 30, 2000, as to its accuracy." H.R. Conf. Rep. No. 479, 106th Cong., 1st Sess. 232 (1999).

The Inspector General then developed a plan to assess the accuracy of 1999 case statistics based on a sample of LSC grantees, including LSNY. The Inspector General made two separate requests or "data calls" to the selected grantees. Pet. App. 7a. The first data call requested the case number and legal problem code for each closed case. *Ibid.* The problem codes describe the subject matter of the representation in terms such

as "Parental Rights Termination," "Education," and "Contracts." *Legal Servs. For New York City*, 249 F.3d at 1080. The second data call required the production of the case number and the client name for each closed case. Pet. App. 7a. The Inspector General constructed a "Chinese wall" separating the client names from the problem codes so that it would not be possible to link a particular client to the subject matter of his representation. *Legal Servs. For New York City*, 249 F.3d at 1080.

Petitioners refused to provide to LSNY, and LSNY refused to provide to the Inspector General, the full name of each client as requested in the second data call. Pet. App. 7a. LSNY maintained that production of the client names, coupled with the information from the first data call, would require disclosure of privileged information and would violate state ethical rules. *Ibid.*

The Inspector General issued an administrative subpoena requiring LSNY to produce the client names and filed a petition in the United States District Court for the District of Columbia for summary enforcement of the administrative subpoena. Pet. App. 7a. The district court rejected LSNY's blanket assertion of attorney-client privilege, while not foreclosing specific claims regarding individual clients. See *United States* v. *Legal Servs. For New York City*, 100 F. Supp. 2d 42 (D.D.C. 2000).

The District of Columbia Circuit affirmed. *Legal Servs. For New York City*, 249 F.3d at 1084. That court held that Section 509(h) authorized the Inspector General to obtain client names and that compliance with the subpoena would not violate state ethical rules. *Id.* at 1082-1084 & n.4.

4. Petitioners were not served with a subpoena or named as respondents in the Inspector General's

subpoena enforcement action against LSNY. Pet. App. 7a. They also did not seek to intervene in that proceeding. *Ibid.* Instead, petitioners filed suit in the Southern District of New York, requesting a declaratory judgment that LSNY and the Inspector General had no right to demand from them the client names that were the subject of the subpoena. *Id.* at 7a-8a. Petitioners also requested that the court enjoin LSNY and the Inspector General from depriving petitioners of funding as a result of their refusal to provide the requested client names. *Ibid.* Petitioners did not, however, assert the attorney-client privilege as a basis for refusing to provide the information. *Id.* at 9a.

The district court granted summary judgment in favor of LSNY and the Inspector General. Pet. App. 5a-19a. The court first rejected petitioners' claim that state disciplinary rules prohibit them from disclosing client names. *Id.* at 10a-12a. The court held that even assuming that the client names constitute "client secrets" under New York disciplinary rules, those rules permit a lawyer to reveal client secrets when "required by law or court order." *Id.* at 10a (quoting N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(c)(2) (2003)). Because Section 509(h) requires disclosure of the client names, the court concluded, such disclosures are "required by law." *Id.* at 13a.

The district court next rejected petitioners' contention that Section 509(h) impermissibly interferes with the judicial function of regulating attorneys. Pet. App. 17a. The court held that the provision in the Disciplinary Rules permitting disclosures required by law foreclosed that argument. *Ibid.* The court also rejected petitioners' contention that Section 509(h) violates the First Amendment because it interferes with the right of an individual to associate with his attorney. *Id.* at

17a-18a. The court concluded that Section 509(h) constitutionally furthers the government's interest in auditing and investigating federal funding recipients. *Id.* at 18a. For similar reasons, the court rejected petitioners' due process and equal protection challenges to Section 509(h). *Ibid.*

In an unpublished opinion, the court of appeals affirmed. Pet. App. 1a-4a. The court held that petitioners' contracts with LSNY require them to provide the client names sought by the Inspector General. The court further held that petitioners' compliance with their contracts would not violate the State's Disciplinary Rules because such disclosure is "required by law." *Id.* at 3a. Having held that petitioners have a contractual obligation to disclose client names to the Inspector General, the court determined that it need not address petitioners' constitutional challenges to Section 509(h). *Id.* at 4a. The court noted parenthetically, however, that it would in any event find those challenges to be without merit. *Ibid.*

ARGUMENT

The court of appeals' unpublished decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1. The court of appeals correctly held that petitioners' contracts with LSNY require petitioners to furnish the client names that LSNY requested in response to the Inspector General's subpoena. Provisions of those contracts substantially duplicate Section 509(h), see Pet. App. 14a, and Section 509(h) explicitly requires organizations that receive funds from LSC to make available to federal auditors "financial records, time records, retainer agreements, client trust fund and

eligibility records, *and client names*." 110 Stat. 1321-59 (emphasis added).

Petitioners contend (Pet. 9) that Congress intended to require production of "client names" only when they are disassociated from problem codes. But the statutory text gives the Inspector General unqualified access to client names; it does not place any limitation on the Inspector General's authority to require the production of those names.

Petitioners argue (Pet. 10) that 42 U.S.C. 2996e(b)(3) prohibits LSC from requiring disclosure of the client names because it specifies that LSC may not "interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility." But Section 509(h) explicitly overrides Section 2996e(b)(3), providing that specified information, including "client names," must be made available to federal auditors "*[n]otwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3))*." 110 Stat. 1321-59 (emphasis added).

Petitioners further contend (Pet. 7) that New York's Disciplinary Rules prohibit them from disclosing "client secrets," and that the requested information constitutes client secrets. But even if the information constitutes client secrets (a question not decided by the courts below), the Disciplinary Rules do not prohibit the disclosure of client secrets if "required by law or court order." See 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(c)(2) (2003). And, as the court of appeals concluded (Pet. App. 3a), making the requested client information available to LSNY is required by Section 509(h) and is therefore "required by law."

The decision below is consistent with the District of Columbia Circuit's decision in *United States* v. *Legal*

Services For New York City, 249 F.3d 1077 (2001). In that case, the District of Columbia Circuit held that "the only sensible reading" of Section 509(h) is that it authorizes the Inspector General to obtain access to client names, without regard to whether the names can be linked to problem codes. *Id.* at 1083. No other court of appeals has reached a different conclusion. Review of that issue is therefore unwarranted.

2. Petitioners argue that, if Section 509(h) requires disclosure of the client names sought by the Inspector General, it violates separation of powers principles, the First Amendment, and the doctrine of unconstitutional conditions. Pet. 15-19. Because petitioners' contracts with LSNY include a provision that duplicates Section 509(h), the court of appeals concluded that the contracts themselves required petitioners to turn over the requested information. See Pet. App. 4a. It thus concluded that it had no need to reach petitioners' constitutional challenges to Section 509(h). *Ibid.* Petitioners do not contend that the court of appeals erred in failing to decide the constitutional challenges. Indeed, petitioners do not mention their contractual obligations at all. Petitioners' constitutional challenges to Section 509(h) are therefore not properly presented here.

In any event, petitioners' constitutional challenges lack merit. Petitioners contend (Pet. 16) that Section 509(h) usurps the state judiciary's authority to regulate attorneys and therefore violates constitutional separation-of-powers principles. As an initial matter, separation-of-powers principles apply to the relationship among the branches of the federal government, not the relationship of an Act of Congress to provisions of state law, such as state attorney disciplinary rules. The latter subject is governed by the Supremacy Clause. In any event, since New York's Disciplinary Rules ex-

pressly permit attorneys to reveal "client secrets" when "required by law or court order," see N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(c)(2) (2003), there is no conflict between Section 509(h) and the state judiciary's authority to regulate the conduct of its attorneys.

Petitioners also err in contending (Pet. 16-17) that Section 509(h) unconstitutionally interferes with the First Amendment right of indigent clients to consult with their attorneys. The Inspector General's request for client names does not prevent indigent clients from consulting their attorneys. Moreover, as the District of Columbia Circuit explained, the Inspector General's "Chinese wall" separating client names from problem codes "renders unlikely the possibility that any secrets will be disclosed." *Legal Servs. For New York City*, 249 F.3d at 1084. Even if the names were linked with problem codes, "the information disclosed would be only the subject matter of the representation as stated in broad terms." *Ibid.* None of this Court's cases remotely supports the sort of blanket First Amendment exemption to disclosure of a professional relationship that petitioners assert here.

Petitioners, moreover, have not explained how disclosure of such general information affects communications between indigent clients and their attorneys. Furthermore, when the government funds the furnishing of services, it is entitled to ascertain the recipients of those services. Any impact on communications between indigent clients and their attorneys is clearly outweighed by the government's overriding interest in ensuring that federal funds are not misused.

Petitioners also argue (Pet. 18) that requiring disclosure of client names to the LSC Inspector General violates the doctrine of unconstitutional conditions be-

cause it requires indigent clients to relinquish their right to confer with their attorneys free from unreasonable government interference. As explained above, however, petitioners have failed to show that the request for client names in connection with a legitimate investigation of the expenditure of federal funds by a grantee has any adverse impact on the ability of legal services clients to confer with their attorneys. Moreover, when Congress funds a program, it has broad authority to ensure that those funds are spent in a way that furthers the purposes of that program. *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Section 509(h) falls well within whatever limits there may be to that authority. By authorizing the Inspector General to obtain access to client names, Section 509(h) ensures that the Inspector General can effectively perform his crucial auditing function.

Petitioners also contend (Pet. 18) that requiring disclosure of client names to LSC auditors violates equal protection because it affects only those who are indigent. In making that argument, petitioners ignore the fact that the LSC Inspector General's request affects only indigent clients because the LSC program is limited to furnishing legal services for the indigent. It is well- established, moreover, that indigence is not a suspect status that triggers any heightened equal protection review. *Maher* v. *Roe*, 432 U.S. 464, 471 (1977). And the LSC Inspector General's request for client names plainly satisfies rational basis review.

3. Finally, petitioners contend (Pet. 19-30) that the appointment of the LSC Inspector General by the LSC Board of Directors, see 5 U.S.C. App. 8G(c), violates the Appointments Clause of the Constitution. But petitioners did not raise that issue in either the district court or the court of appeals. Accordingly, neither

court addressed that issue. Because the Appointments Clause issue was neither pressed nor passed upon below, it is not properly presented here. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider issue "raised for the first time in the petition for certiorari").

In any event, petitioners' Appointments Clause challenge lacks merit. The Appointments Clause requires that the President nominate and, with the advice and consent of the Senate, appoint principal officers of the United States. U.S. Const. Art. II, § 2, Cl. 2. The Appointments Clause also provides, however, that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* Because the LSC Inspector General is an "inferior Officer," and the LSC Board of Directors is a "Head[] of Department[]," Congress had authority under the Appointments Clause to assign to the LSC Board of Directors the power to appoint the LSC Inspector General.

Petitioners err in contending (Pet. 25-28) that the Inspector General is a principal officer, rather than an inferior officer. Under *Edmond* v. *United States*, 520 U.S. 651, 663 (1997), an officer is an "inferior officer" within the meaning of the Appointments Clause if he "is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." The Inspector General qualifies as an inferior officer under that standard because Congress has expressly provided that the "Inspector General shall report to and be under the general supervision of" the LSC Board of Directors, 5 U.S.C. App. 3, and because the members of the Board

are appointed by the President with the advice and consent of the Senate, 42 U.S.C. 2996c(a).

Petitioners' contention (Pet.28-30) that the Board of Directors is not a "Head of Department" is similarly without merit. Because Board members are appointed by the President with the advice and consent of the Senate, and because they have no "relationship with some higher ranking officer or officers below the President," *Edmond*, 520 U.S. at 662, the Board is a "Head of Department" for purposes of the Appointments Clause.

Relying on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), petitioners contend (Pet. 29-30) that the Board is not a "Head of Department" within the meaning of the Appointments Clause because LSC is not like the cabinet-level departments. Petitioners' reliance on *Freytag* is misplaced. That case reaffirmed that the term "Heads of Departments" in Article II, Section 2, Clause 2, does not embrace "inferior commissioners and bureau officers," 501 U.S. at 886 (quoting *United States* v. *Germaine*, 99 U.S. 508, 511 (1879)). The Court did not address, however, whether the heads of "principal agencies"—in which the Court included entities such as the Federal Trade Commission, the Central Intelligence Agency, and the Federal Reserve Bank of St. Louis—may appoint inferior officers. *Id.* at 887 n.4. *Freytag* is therefore inapposite here.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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